

National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: July 30, 1997

TO: Elizabeth Kinney, Regional Director, Region 13

FROM: Barry J. Kearney, Associate General Counsel, Division of Advice

SUBJECT: Novelty Workers Local 20 (Various Employers) Case 13-CB-15254; Novelty Workers Local 18 (Various Employers), Case 13-CB-15255; International Union of Novelty Workers (Various Employers), Case 13-CB-15256; Novelty Workers Local 24 (Various Employers), Case 13-CB-15257; Novelty Workers Local 12 (Various Employers), Case 13-CB-15258; Novelty Workers Local 16 (Various Employers), Case 13-CB-15259; Central States Joint Board (Various Employers), Case 13-CB-15260; Novelty Workers Local 10 (Various Employers), Case 13-CB-15261; Acme Industrial, Case 13-CA-34712; Wertheimer Box & Paper Corp., Case 13-CA-34713; Wabash Pioneer Container Corp., Case 13-CA-34714; Tin Plate Partners International, Inc., Case 13-CA-34715; Republic Packaging Corp., Case 13-CA-34716; Punch Products Mfg. Co., Case 13-CA-34717; Premier Refractories & Chemical, Inc., Case 13-CA-34718; Nu-Way Speaker Products, Case 13-CA-34719; Kerrigan Lewis Electronic, Case 13-CA-34720; Health-O-Meter, Case 13-CA-34721; Dearborn Wire & Cable Co., Case 13-CA-34722; Daystar Mfg., Inc., Case 13-CA-34723; Consolidated International Corp., Case 13-CA-34724; Chilo Mfg. & Plating Co., Case 13-CA-34725; Chicago Steel & Tin Plate, Case 13-CA-34726; Arena Auto Auction, Case 13-CA-34727; American Electronic Wire Co., Case 13-CA-34728

596-0420-0100, 596-0420-5087, 596-0420-5500, 596-0465-0000

These cases were submitted for advice on the question of whether "adverse domination" of the Charging Party, Laborers Local 8, should operate to toll the application of Section 10(b) of the Act.

FACTS

At all times material prior to November of 1994, John Serpico was the president of Local 8 of the Laborers' Union in Chicago, and in addition he was a second vice-president of the Laborers' International Union (LIUNA). Unlike every other Chicago-area local union of LIUNA, Local 8 was not affiliated with the LIUNA Chicago District Council. Rather, Local 8 was affiliated with the Central States Joint Board (CSJB). The CSJB appears to be an independent entity consisting of seven Chicago-area local unions. Six of the seven were, and are, affiliated with the Novelty Workers Union, a/k/a Toy Union. The seventh union was Local 8.

The CSJB appears to be managed and controlled by John Serpico and several others who were also senior officials of the Toy Union International and/or all of the CSJB's participating local unions. **DATE:** All officers and business agents are paid by the CSJB. All of these persons operate exclusively from CSJB headquarters. The Toy Union's national headquarters recently moved from New York to the CSJB building in Chicago.

In November 1994 the Department of Justice notified LIUNA that it was considering initiating a civil RICO action against LIUNA to remedy "long-standing" organized crime influence within LIUNA. The DOJ included in its communication to LIUNA a draft complaint that stated that LIUNA was a "racketeering enterprise" and sought a broad range of injunctive relief against the union including the appointment of "court liaison officers" to "discharge the duties" of LIUNA's General President and General Executive Board. One of the DOJ's specific targets was Mr. Serpico.

In January 1995, LIUNA agreed to take emergency remedial action designed to rid its ranks of mob influence. As part of that process, LIUNA amended its constitution to add an Ethics and Disciplinary Procedure (EDP) and an Ethical Practices Code. Pursuant to the EDP, LIUNA appointed an independent prosecutor known as the GEB Attorney and an Inspector General. The GEB Attorney initiated action to remove Serpico from his positions as LIUNA vice-president and Local 8 president. In June 1995, Serpico and LIUNA reached a settlement under which Serpico agreed to step down from all of his union offices but with

the further agreement that Serpico's resignation from his position of president of Local 8 would be deferred for seven months until January 31, 1996.

From around November 1994, the officers of Local 8, led by Serpico, systematically assigned or transferred Local 8's collective bargaining agreements and its members to the local Toy Union locals that are members of the CSJB. Most of these transfers occurred between November 1994 and May of 1995, although some occurred as late as December of 1995. Business representatives of Local 8 simply contacted the charged Employers and instructed them to stop remitting dues payments to Local 8, and to instead remit them to one of the charged Toy Union locals. The Local 8 business representatives told the charged Employers that the members had decided to switch unions because of rising dues in Local 8, and in some cases presented signed authorization cards for one of the charged Unions. The charged Employers all agreed to recognize the other union, and, as their collective bargaining agreements with Local 8 expired, they signed successor agreements with one of the charged Toy Union locals.

As a direct result of these actions, during the period from November 1994 to May 1995, Local 8's membership declined from about 1300 members to about 300. Throughout this same period, Local 8, pursuant to the International's rules, filed monthly reports to the International regarding its membership, and paid to the International a "per capita" tax based on the number of members it had. These monthly reports accurately show not only that the membership declined precipitously, but also list the name and member identification numbers of the members who were suspended from membership. These suspensions were, of course, the direct result of the transfers of those members to the Toy Union locals by Serpico.

Finally on January 31, 1996, Serpico, pursuant to the settlement he had reached with the International, resigned. Local 8 claims that the first knowledge that the International had of the scheme was in May 1996, when an attorney arranging the election for delegates to the International convention became suspicious about Local 8's decline in membership. That attorney investigated on his own and came to the conclusion that Serpico had authorized or directed the transfer of membership. Part of that attorney's investigation included a meeting with Local 8's then current principal officer and CSJB official, Maria Busillo, and her counsel. When the attorney asked about the sudden and substantial loss of members, Ms. Busillo and her counsel gave vague and evasive answers, suggesting that the Local had lost elections and that employers had closed. He reported his findings in a letter, dated July 1, 1996, to the LIUNA Inspector General. It was not until July 15, 1996 that the International appointed a trustee for Local 8. The instant charges were not filed until November 12, 1996.

ACTION

We conclude, in agreement with the Region that Section 10(b) bars the issuance of a complaint in the circumstances of these cases.

The limitations period of Section 10(b) does not begin to run until the charging party receives clear and unequivocal notice--either actual or constructive--of the acts that constitute the alleged unfair labor practice, i.e., until the aggrieved party knows or should know that his statutory rights have been violated. John Morrell, 304 NLRB 896 (1991). As a corollary--and a fortiori--when a party deliberately misrepresents or conceals operative facts concerning its actions so that the affected party is unable, even through the exercise of due diligence, to discover those facts, the 10(b) period does not begin to run until the deceived party obtains the relevant facts. Thus, the running of the limitation period may be tolled if the perpetrator of the unfair labor practice fraudulently conceals the unlawful conduct so that the charging party is not put on notice of the illegal activity. The Board requires a sufficient nexus between the hidden facts and the alleged violation before finding fraudulent concealment of the material facts. See, e.g., Duff-Norton Co., 275 NLRB 646 (1985). In this regard, the General Counsel must establish that "(1) deliberate concealment has occurred; (2) material facts were the object of the concealment; and (3) the injured party was ignorant of those facts, without any fault or want of due diligence on its part." Brown & Sharpe Mfg. Co., 312 NLRB 444 (1993).

Here, in agreement with the Region, we would not find that the fraudulent concealment doctrine, as recently confirmed in Brown & Sharpe Mfg. Co., applies in this case. The evidence fails to show that the charged Employers deliberately concealed either their withdrawals of recognition from Local 8 or their recognition of one of the charged Toy Union locals. The only potential act of concealment by the Charged Unions occurred in May of 1996, more than a year after the majority of the transfers took place. In view of the overt nature of the unlawful conduct here, we conclude that the International Union failed

to exercise "due diligence" to discover that conduct. Despite finding sufficient cause to remove Serpico as president of the local, LIUNA took no action for over a year to investigate the sudden loss of membership in Local 8. Thus, put on notice that Local 8's membership was rapidly falling, and knowing that Serpico was allegedly an underworld crime figure who was corrupt enough to be kicked out of the Laborers Union, the International should have deduced that there probably was a connection between Serpico's pending removal and the fall in the local's membership roles, or should have at least looked into why the local's ranks were plummeting. Had it done so, it could have determined what was happening by at least the summer of 1995 and could have taken action then to file the instant charges.

The Charging Party contends, however, that under an "adverse domination" theory, Section 10(b) should be tolled during the period that Serpico dominated the International and Local 8. It cites five Federal District court cases⁽¹⁾ in support of its argument. The cases generally concern situations involving alleged gross negligence and/or corrupt practices committed by the officers and/or directors of financial institutions, where many years later after the institutions became insolvent, the FDIC or the Resolution Trust Corporation (RTC) are trying, as receivers, to sue those negligent or corrupt officers and directors and collect damages.

In Gallagher, the RTC, as receiver, brought the action against the former officers and directors of Concordia Federal Bank for Savings and its subsidiary, Concor Financial Services, Inc. The defendants argued, inter alia, that some of the RTC's claims were barred by the Illinois statute of limitations. In response, the RTC argued that these limitations periods were tolled under the adverse domination doctrine. The Court then stated the doctrine as follows:

The adverse domination doctrine tolls the running of the statute of limitations period where the entity is controlled by or dominated by wrongdoers. The statute of limitations begins to run again when the wrongdoers lose control of the entity. This rationale behind the adverse domination doctrine is premised upon the principle that officers and directors who have harmed the entity cannot be expected to take legal action against themselves.

The Court accepted the RTC's argument and, noting that the doctrine has been applied in many cases, denied the defendants' motion to dismiss based on the ground that the claims were time-barred.

In Chapman, the RTC, as receiver for the Security Savings and Loan Association of Peoria, had filed a lawsuit against the former directors of the failed savings and loan association, alleging gross negligence with regard to their underwriting practices for commercial and real estate loans. The defendants asserted that all claims against them were barred by the Illinois statute of limitations. Again the RTC argued the adverse domination doctrine. "Under the doctrine of adverse domination, the statute of limitations is tolled for as long as a corporate plaintiff is controlled by the alleged wrongdoers." Farmer, 865 F. Supp. at 1151 (citing 3A JAMES SOLHEIM & KENNETH ELKINS, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS s 1306.20 (perm. ed. rev. vol. 1994)). "The rationale for this principle is that control of the board by wrongdoers precludes the possibility for filing suit since these individuals cannot be expected to sue themselves or initiate action contrary to their own interests." Federal Deposit Ins. Corp. v. Greenwood, 739 F. Supp. 450, 453 (C.D. Ill. 1989).

The RTC further argued that the adverse domination doctrine is a logical extension of Illinois' discovery rule. The Court, quoting from a decision of the Illinois Supreme Court explained the discovery rule:

Literal application of the statute of limitations, however, sometimes produced harsh results, and in response, the discovery rule was developed. When the discovery rule is applied, it "delays the commencement of the relevant statute of limitations until the plaintiff knows or reasonably should know that he has been injured and that his injury was wrongfully caused. [Citation omitted]. This rule developed to avoid mechanical application of a statute of limitations in situations where an individual would be barred from suit before he was aware that he was injured...." The basic problem is one of balancing the increase in difficulty of proof which accompanies the passage of time against the hardship to the plaintiff who neither knows nor should have known of the existence of his right to sue. There are some actions in which the passage of time, from the instant when the facts giving rise to liability occurred, so greatly increases the problems of proof that it has been deemed necessary to bar plaintiffs who had not become aware of their rights of action within the statutory period as measured from the time such facts occurred. [Citations.] But where the passage of time does little to increase the problems of proof, the ends of justice are served by permitting plaintiff to sue within the statutory period computed from the time at which he knew or should have known of the existence of the right to sue. [Citations omitted.].

The Court went on to state: "In sum, the adverse domination doctrine is simply a common sense application of the discovery rule to a corporate plaintiff. If a company's board of directors is the only body which can bring a lawsuit on behalf of the company, and the board of directors are the only members of the company with the knowledge the company has a cause of action, and the members of the board of directors are the potential defendants in that cause of action, it is simply unreasonable to expect those individuals to sue themselves. For purposes of the discovery rule, therefore, the company does not know of its cause of action until the wrongdoing board of directors no longer controls it."

Initially, we conclude that, in the proper case, there is a basis to argue that the theory of adverse domination does have applicability to 10(b). However, the instant case is not the proper vehicle in which to argue adverse domination as a theory of first impression to the Board, because, the facts of this case are such that the theory would not be able to be cleanly presented to the Board.

First arguing adverse domination here would require evidence, not heretofore developed but only alleged by representatives of the Charging Party, to the effect that Mr. Serpico's domination of Local 8 did not end as of January 31, 1996 (the effective date of his resignation) but continued, through his hand-picked successor and other officials of the local who were Mr. Serpico's henchmen and women, up until the trustee appointed by the International took charge on July 15, 1996. Second, the Respondents can defend with the argument that the International Union should have exercised "due diligence" to learn that unfair labor practices were occurring, as discussed above. Respondents can further argue that the International's notice, actual or constructive through its failure to exercise due diligence, should be imputed to Local 8, the entity that actually filed the instant charges, through the International's Trustee for Local 8. Thus, an "undominated" Local 8 is simply the creation of and the same as the International, and notice to the International is the same as notice to Local 8. Charging Party Local 8 is run by the International's appointed Trustee over Local 8; this International Trustee arguably represents the International in filing these charges at least to the same extent that he represents Local 8.⁽²⁾ In other words, the argument for tolling 10(b) mistakenly ascribes separate aggrieved party status to an "undominated" Local 8, because such entity is under the trusteeship and control of the International. Thus, there is only one "aggrieved party"--the International in trust over Local 8. In this regard the International had an obligation to act under its agreement with the Department of Justice to ensure, inter alia, mob-free local unions. In sum, in view of all of the above arguments and counterarguments, this case is a poor vehicle for presenting the "adverse domination" theory to the Board.

We recognized that there exist counterarguments to Respondents' defenses to the adverse domination theory. It could be argued that it is simply irrelevant that the International knew or should have known about the violations. Thus, it could be argued that there are two "aggrieved" parties and the International was at best only one of the aggrieved parties--Local 8 is also aggrieved and is the actual Charging Party in these cases. Furthermore, there is no case precedent standing for the proposition that, when Section 10(b) runs against one aggrieved party, it necessarily also runs against all other aggrieved parties or is there case precedent dealing with a 10(b) defense where there existed multiple aggrieved parties. The "undominated" Local 8 came into existence on July 15, 1996, when the International Union appointed its Trustee, and filed the charges which are timely with respect to that July 15 date. Therefore, arguably there is no 10(b) bar against the "undominated" Local 8 notwithstanding the fact that the International may well have been 10(b) barred from filing the charges. However, given the difficulties presented on this case, we conclude that this is not a proper vehicle to present these novel theories to the Board.

Finally, the Dominick's Finer Foods⁽³⁾ case, cited by the Charging Party's counsel, is distinguishable from the instant cases. It presents a similar fact pattern to our case, with one significant difference--there is no Section 10(b) problem whatsoever. The charges in Dominick's were filed safely within 6 months of when the alleged unfair labor practices took place. Therefore, it is wholly inapplicable to the 10(b) issue presented in our case. Accordingly, the instant charges should be dismissed for all the above reasons.

B.J.K.

¹ Resolution Trust Corp. v. Gallagher, 800 F. Supp. 595, 600 (N.D. Ill. 1992); Resolution Trust Corp. v. Chapman, 895 F. Supp. 1072, 1079 (C.D. Ill. 1995); Resolution Trust Corp. v. Franz, 909 F. Supp. 1128, 1134 (N.D. Ill. 1995); Resolution Trust Corp. v. O'Bear, Overholser, Smith & Huffer, 840 F. Supp. 1270, 1283 (N.D. Ind. 1993); Fed. Deposit Ins. Corp. v. Greenwood, 739 F. Supp. 450, 453 (C.D. Ill. 1989).

² See for example, Local 542, IUOE, AFL-CIO, 141 NLRB 53, 55 (1963) where the Board found that both the International and the Local were jointly and severally liable for unfair labor practices committed by the Local, because the International had appointed its trustee over the Local:

"we base our findings in this respect on the fact that

Respondent International placed the Local under a trusteeship, which...squarely vested the International with full and complete control over the Local's activities."

³ 308 NLRB 935 (1992), enfd. 28 F.3d 678 (7th Cir. 1994).